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CASE NO._____

UNITED STATES SUPREME COURT

OCTOBER 1980 TERM

JAMES SHELTON,

PETITIONER

VS

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

PETITION FOR CERTIORARI

FOR PETITIONER:

James Shelton
Attorney Pro SE
4733 Village Pl. N.E.
Seattle, Wa. 98105
206-525-6200

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QUESTIONS PRESENTED FOR REVIEW

1. IS TITLE AN APPEALABLE MATTER WHERE CIRCUIT COURT PREVIOUSLY MANDATED TO THIS LITIGANT THE RULE THAT AGENCY MAY-NOT BE SUED EO NOMINE AND WHERE DISTRICT COURT NOW DISMISSED THIS MATTER BECAUSE LITIGANT DID NOT SUE AGENCY EO NOMINE WHERE DISTRICT COURT FOUND DEFENDANT WAS ACTUALLY IN DEFAULT AT THE TIME AND DID NOT ENTER THE JUSGMENT?

PARTIES

PETITIONER: James Shelton

RESPONDENT: United States

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United States v. Wahlin, (1974)
384 F.Supp 43 12

B. STATUTES

United States Supreme Court
Rule 19 (b) 28 USC 1

Freedom of Information Act
5 USC 552 2,3,7,11,12

F.R.C.P. 55, 28 USC 1,14

F.R.C.P. 71A, 28 USC 2,11

28 USC 2101 (c) 1

GROUNDS FOR JURISDICTION

On 9 December 1980 Ninth Circuit Court filed and entered Judgment that the District Court's judgment was not appealable. No rehearing was requested.

United States Supreme Court Rule 19 (b), 28 USC and 28 USC 2101 (c) confer on this Court jurisdiction to review this judgment by writ of certiorari.

STATUTES AND PROVISIONS OF THE CASE

Federal Rules Of Civil Procedure Rule 55 (a), 28 USC. Default.

Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

Federal Rules Of Civil Procedure Rule 55 (e), 28 USC.

Judgment Against the United States. No judgment by default shall be entered

against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

Federal Rules Of Civil Procedure Rule 71A

(c)(1), 28 USC. Complaint.

Caption. The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and lacation, and at least one of the owners of some part of or interest in the property.

5 USC 552 Freedom Of Information Act.

See appendix.

STATEMENT OF THE CASE

Shelton wrote to Spain and asked them to send guitars. When the first guitar arrived a dispute arose, spurred on by one of Shelton's competitors, over what the price and duty of the guitars ought to be. Shelton offered to pay that duty, however defendant declined and in the enterum held a proceeding on Shelton's premises and re-

moved documents without permission and subsequently filed suit to take the subject guitar. United States v. One Classic Guitar 571 F.2d 589. Remanded and pending.

Shelton requested documents relating to supra but defendant, knowing he will lose if the documents are released, refuses to give up these documents under the Freedom of Information Act.

In this action Shelton appears Pro Se asking for copies of his U.S. Customs Petition Record except those documents which are exempted by statute. This case arose from supra case which was brought on by Respondant herein, and because his facts do not add up in that case he is trying to secret them.

Shelton completed the Petition process of U.S. Customs case #76-3001-00175. He also completed Freedom of Information Act appeals process, see paragraph 4 of Commissioner of Customs letter in appendix.

Moreover these letters refusing information were on file and well known to defendant and with the court and the court being fully advised on the premises should have known this to be the case by its own records.

Therefore, when defendant did not answer letters requesting copies of documents not exempted by law Shelton filed complaint in District Court of Washington D.C. where he suspected the documents could be obtained. Moreover, Shelton's complaint is based on the statutes referred to in the final paragraph of the Customs letter, although that statute does not specifically state who the action is to be filed against.

On 23 August 1979 the matter was transferred to Seattle District Court. Defendant admitted knowledge of records sought and that they were located in Seattle.

In the mean time the case had dragged on since fileing on 13 June 1979 to middle of September 1979 and no Answer was forth-

coming from defendant, so at that time Shelton filed and served Notice of Default.

Defendant had been made aware of time limits for Answer several times. The District Court found defendant did not answer in a timely fashion. The Default Motion was decided in chambers, without a hearing. The Ninth Circuit Court had previously ruled "Shelton" may not sue U.S. Customs "eo nomine". Shelton v. United States Customs Service, 565 F.2d 1140.

In the mean time, while the Default motion was still pending before the court, defendant entered a motion to dismiss, which interposed several arguments which could be used to defeat the default.

The District Court used those arguments and held inter alia, that because Shelton had improperly named the United States as the defendant the default was denied and the motion of the United States for dismissal was granted.

The matter was appealed to the Ninth Circuit Court of Appeals because that court had held that Shelton may not sue U.S. Customs "eo nomine". The Ninth Circuit Court Ruled that the court order dismissing the case based on title was not an appealable issue. Thus the matter was effectively locked between the courts and was the cause of this petition.

ARGUMENT FOR THE WRIT

The title in this case is an appealable matter because the Circuit Court mandated to this litigant the long standing rule that agencys may not be sued "eo nomine" and the District Court dismissed the matter because this litigant did not sue the agency "eo Nomine"and the District Court admitted the defendant actually was in default at the time.

Furhter the District Court erred in not following Federal Rules of Civil Pro-

cedure as follows:

1. by allowing a motion to be filed after the Default was lodged by clerk.

2. By Court's refusal to enter the Default.

This matter is hopelessly locked between higher and lower court conflicting judgments. The Ninth Circuit has recently directly mandated to this litigant, James Shelton vs U.S. Customs Service 76-3762 565 F. 2d 1140 "It is well established that federal agencies are not subject to suit eo nomine ".

Additionally there is no explicit language in the Freedom of Information Act 5 JSC 552 (a)(4)(B), requiring agency be sued eo nomone, in fact the statute specifically authorizes that "litigation costs and fees may be assessed against the United States," 5 USC 552 (a)(4)(F).

Since the above statute was pointed out in the Commissioner of Customs letter

(see appendix) Shelton filed suit against United States as any logical person would. the records requested were clearly listed with agency reference numbers so that there was no confusion in finding these records and the agency involved is mentioned right in the complaint itself.

Moreover, the defendant acknowledged awareness of the records and even had the case transferred to the Seattle court for convience to those records. See affidavits of the parties.

It was therefore inconcievable that the district court would dismiss the matter based on title of the case, where these acknowledgments had been made and considering the following cases were not dismissed for title eo nomine:

Pope v. United States
459 F.Supp 426 (S.D. Tex 1977)

Nix v. United States of America
572 F.2d 998 (4 Cir. 1978)

Nichols v. United States 325 F.Supp 130 (D. Kan 1971) aff'd 460 F2d 67 (10 Cir) Cert Denied 409 U.S. 966 (1972)

Mims v. United States, Civ Act. No. 8935 (D.N.M. July 8,1971)

Marks v. United States 578 F.2d 261 (9 Cir 1978)

Luzaich v. United States 435 F.Supp 31 aff'd 564 F.2d 101(8 Cir 1977)

Hurt v. United States Civ. Act. No. 72-3183 (9th Cir Sept.11, 1974)

Hogan v. United States, Civ.Act.No.73-1385 (S.D. Fla. Jan.25,1974)

Electric Memories and Magnetic Corp. v. U.S. 431 F.Supp 356 (D. Cal. 1977)

Benson v. United States, 309 F.Supp 1144 (D. Neb 1970)

Nor can Petitioner find any other cases which were dismissed for title eo nomine. So that the situation now is:

1. Shelton's case has been dismissed by lower court for non suit of agency eo nomine. and,

2. Shelton is under mandate from 9th Circuit court that agencies may not be sued eo nomine. and,

3. Shelton appealed the matter to the 9th Circuit who now ruled a case title is not an appealable matter!

Thus leaving the issue trapped between the two courts.

Since, title presendence is clearly represented in supra list of cases and since there is no where else to turn we ask this Court to decide the issue between the two lower courts.

B. CONFIGURATION OF THE CASE

Shelton filed a Complaint against the agents and U.S. Customs agency when documents were removed without authorizations from his premises, Shelton v. U.S.Customs 565 F.2d 1140. Ninth Circuit ruled the agents were emmune and the agency eannot be sued eo nomine, supra.

In the interim defendant filed complaint United States v. One Classic Guitar 571 F.2d 589 in an attempt to aquire additional of Shelton's property.

Therefore Shelton filed a new complaint "eo nomine", Shelton v. United States, which United States did not answer, reference certiorari case No. 80-725, for property damages.

Additionally Shelton filed a new complaint to recover the missing documents Shelton v. United States citing Freedom of Information Act and conforming to the Ninth Circuit Mandate and is the herein intitled case. Again the United States did not Answer, see 5 USC 552 (a)(4)(C).

The Complaint involves personal records and property of Shelton therefore under the provisions of F.R.C.P. 71A (c)(1) it is only necessary to name one of the owners of some part of or interest in the property, in the caption. Shelton appears to have complied with that provision in this case.

Shelton had applied for documents under discovery procedures in the pending case but was refused for one reason or

another. In any case Shelton is entitled rely on the Freedom of Information Act to obtain discovery of certain rulings of the agency. United States v. Wahlin, 384 F. Supp 43 (W.D. Wis 1974) at page 44.

Shelton completed agency process under Freedom of Information Act and letter so stating was attached to the appeal and is attached hereto in appendix; eventhough it is not necessary for claimant to allege facts sufficient to constitute a cause of action in his behalf since the abolition of the demurrer is purposeful and effective, Swenson v. Suhl (1956, D.C. Neb) 19 FRD 517.

However the District Court dismissed the Complaint stating that "the proper defendant is the agency withholding the requested information, not the United States generally". But, Shelton is under previous mandate from Ninth Circuit that "United States Customs may not be sued eo nomine" and is therefore mandated by

the higher court. The complaint, therefore, could not be cured by amendment since the dispute apparently lies between the two courts. Shelton's Complaint , therefore, lies trapped between the two conflicting rulings.

C. DEFAULT UNDER THE RULES

The Motion to Dismiss was not filed until several days after Shelton's application for default. The default was acknowledged by the District Court.

Since, defendant still has not answered this complaint and has not answered other complaints (see certiorari 80-725) there is no reason to believe he will now change and do so.

As Shelton explained to the lower court, he actually has completed agency process and since Pleas and demurrers are abolished it is no longer necessary to allege every detail plaintiff will eventually have to prove in the complaint.

It has been Petitioners position that defendant defaulted in any case. This was acknowledged by the District Court in it's judgment, however the court erred in not entering that judgment. F.R.C.P. 55 (e), 28 USC.

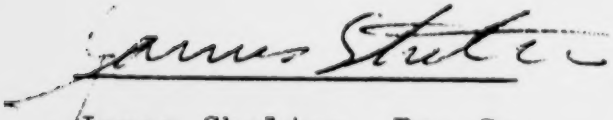
It appears the District Court also erred in allowing defendant to file Motion to Dismiss while he was in default and the default issue was still lodged before the court at the time, F.R.C.P. 55 (a), 28 USC.

Additionally, defendant was not entitled to appear while in default, as he did under guise of motion to dismiss, Bowles v. Branick, 66 F.Supp 557 (1946). This is second time defendant has pulled his dismissal trick while actually being in default, See certiorari 80-725. However in this case the District Court was required to enter defendant's default per F.R.C.P. 55, 28 USC. However, when the default application was duly made the

District Court refused to enter the default.

If the courts don't obey the rules what more can we expect of the citizenery? Plaintiff, respectfully therefore, asks this high court to please review this matter.

Respectfully Submitted,



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(COPY)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C79-1059S

JAMES SHELTON,

Plaintiff,

vs

UNITED STATES OF AMERICA,

Defendant.

ORDER ON PLAINTIFF"S MOTION
FOR AN ORDER OF DEFAULT AND
DEFENDANT"S MOTION TO DISMISS

This cause comes before the Court on plaintiff's Motion for an Order of Default and the defendant's Motion to Dismiss. After reviewing the Motions, memoranda, and pleadings herein, together with the record in C76-731S, and being fully advised, this Court rules as follows:

On June 20, 1979, the plaintiff filed a Complaint in the District of Columbia under the Freedom of Information Act, 5 USC 522, to obtain "the full petition of record and transcrips (sic)" from U.S. Customs Case #76-3001-00175. The United States was served on June 25, 1979 but it did not file Answer. On August 22, 1979, the case was transferred to this District. On September 12, 1979, the plaintiff filed a Motion for an Order of Default, and the Government responded on September 18 with a Motion to Dismiss. The plaintiff relies on the following language from 5 U.S.C. 552 (a)(4)(C):

> ...the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

Despite the Government's failure to respond in a timely fashion to the plaintiff's Complaint, an Order of Default may not issue in this case. Federal Rule of Civil Procedure 55(e) states that:

> No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

The Court finds no such evidentiary showing by the plaintiff, and his Motion for an Order of Default is accordingly DENIED.

The plaintiff's Complaint suffers at least two defects. In particular, the plaintiff neither alleges nor offers any evidence that he has exhausted his administrative appeals as provided in 19 C.F.R. 103.5:

> When...the appropriate regional commissioner or district director of Customs, has denied a request for records in whole or in part, the requester may, within 30 days of its receipt, appeal the denial to the Commissioner of Customs... The appeal shall be in writing.

Plaintiff does not allege the filing of any

such appeal, nor does he offer any excuse for his failure to do so. And as one District Court has held in a Freedom of Information Act case:

> In most cases a federal court may review the actions of a governmental agency only after the Plaintiff has exhausted all of his administrative appeals. McKart v. U.S., 395 U.S. 185, 89 S.Ct. 1657, 23 L. Ed. 2d 194 (1969).

Shermco Industries v. Secretary of the United States Air Force, 452 F. Supp. 306, 315-16 (N.D. Tex. 1978). See also Morpugo v. Board of Higher Education, 423 F.Supp. 704, 714 at n.26 (S.D.N.Y. 1976).

Moreover, the Freedom of Information Act indicates that the proper defendant is the agency withholding the requested information, not the United States generally. This is the clear purport of 5 U.S.C. 552 a(g)(1) and appears to be the intent of 5 U.S.C. 552(a)(4)(A).

Therefore, both because the plaintiff has failed to show exhaustion of his administrative appeal, and because he has improperly named the United States as the defendant, the motion of the United States for dismissal is GRANTED.

The Clerk of this Court is directed to enter judgment for the defendant dismissing plaintiff's Complaint, and send copies thereof, together with uncertified copies of this Order, to the plaintiff and to defendant's attorney of record.

DATED at Seattle, Washington, this (16) Day of January, 1980.

(signed)

UNITED STATES DISTRICT JUDGE

(copy)

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON
Oct 4 1976

ADM 3-03:R:E:F
76-592570 TJS

Mr. James H. Shelton
University Village Music Center
4733 Village Plaza, N.E.
Seattle, Washington 98105

Dear Mr. Shelton:

YOur letter of August 3, 1976, appeals a decision of the Regional Commissioner of Customs, San Francisco, denying disclosure of certain documents relating to Seattle Penalty Case No. 76-3001-00175, pursuant to the Freedom of Information Act, as amended.

We understand that your supplemental petition for relief from forfeiture of merchandise pursuant to section 1592, title 19, United States Code, has been denied by the Regional Commissioner. However, since you have nor yet deposited the mitigated amount of the penalty with the U.S. Customs Service, the possibility of litigation in this matter remains real.

It is our position that the mitigation procedure set forth in section 1618, title 19, United States Code, is part of a law enforcement proceeding, and that the disclosure of these records to you while the proceeding is pending, would be premature. Accordingly, it is our determination that the requested records are exempted from disclosure pursuant to 5 U.S.C. 552(b)(7)(A), because their disclosure would interfere with an ongoing enforcement proceeding initiated by the Government.

As this determination is the final admin-

istrative action taken in regard to your request, you may seek judicial review of this denial of your appeal pursuant to 5 U.S.C. 552(a)(4)(B) in the United States District Court in the district in which you reside, or have a principal place of business, or in which the agency records are located, or it the United States District Court for the District of Columbia.

Sincerely yours,

(signed)
Commissioner of Customs

(C O P Y)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 80-3074

JAMES SHELTON,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

Before: CHOY and FERGUSON, Circuit Judges

Upon due consideration of the materials filed in this appeal, the court finds that the district court's order is not appealable as a final order. See Jones v. Pitchess, 469 F.2d 678, 679 (9th Cir. 1972); Ruby v. Secretary of U.S. Navy, 365 F.2d 385, 387 (9th Cir. 1966), cert. den. 386 U.S. 1011 (1967); Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975). The appeal is hereby dismissed.

(Filed an entered Dec. 9, 1980)

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fee shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complaintant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaintant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of

law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complaintant has substantially prevailed.